IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
CRIMINAL APPEAL NO. 255 OF 1988

Pralhad Krishnat Patil & anr. Appellants (Org.Accused Nos. 1 & 2)

Vs.

The State of Maharashtra Respondent

Mr.T.E.Mane for appellants.
Ms.V.R.Bhosale, APP for Respondent-State.

WITH

CRIMINAL APPEAL NO.531 OF 1988

The State of Maharashtra Appellant

Vs.

Pralhad Krishnat Patil & 10 ors. Respondents (Org.Accused Nos.1 to 11)

Ms.V.R.Bhosale, APP for Appellant-State.
Mr.T.E.Mane for Respondent Nos.1 to 9 and 11.

CORAM: S.S.PARKAR &
SMT. RANJANA DESAI,JJ.

August 03 & 04, 2004.

ORAL JUDGMENT (PER S.S.PARKAR,J.)

1. These two appeals have been filed by the convicted accused and the State against the judgment and order dated 15th March 1988 delivered by the Addl. Sessions Judge, Solapur convicting and sentencing

the accused nos.1 and 2 for offence under Sections 304 Part II and 341 both read with Section 34 of IPC and acquitting the rest of the accused i.e. accused nos.3 to 11 of all the offences in Sessions Case No.108 of 1987. Since both these appeals arise from the same judgment in Sessions Case No.108 of 1987, these appeals were heard together and are being disposed of by this common judgment.

2. The prosecution case briefly stated is as follows:

The incident of assault took place on 6th March 1987 at about 6-30 p.m. in village Mirzanpur in Taluka Barshi, Dist. Solapur in which one Bharat Govind Late died. It seems there was some political rivalry in the village due to grampanchayat elections and the complaints were also lodged against accused no.1 by some villagers including the deceased and the witnesses in respect of fair price shop which was being run by

accused no.1. On the complaint lodged with the District Supply Officer by some persons in which lead was taken by deceased Bharat the licence issued to accused no.1 for running the fair price shop was suspended and thereafter he had obtained stay from the Government on the suspension order. The deceased and others had objected to the stay granted by the Government on the suspension of the licence issued to accused no.1 in respect of the fair price shop.

3. PW 8 Bhujang Sangale was working as mechanic at Tuljapur. He used to go to Tuljapur from Mirzanpur and come back after his work on his moped motor cycle. On the date of the incident Bharat Late met PW 8 Sangale near Tuljapur ST stand. At the request of Bharat PW 8 gave him lift on his motor cycle. They reached Mirzanpur village by about 5-30 p.m. near the primary school building. His sister Kamal PW 15, after learning that accused persons had gathered to beat PW 8, went

running near the school and sounded him that the accused were waiting for him and there was danger. At that time accused persons armed with iron bars and sticks went near the motor cycle of PW 8. Accused no.2 Kisan dealt a blow with hunter in his hand on the back of PW 8. PW 8 asked Bharat to get down and run away. PW 8 also started running towards Tuljapur side. Some of the accused tried to chase PW 8. Others started beating Bharat. Accused No.1 had assaulted Bharat on his head with iron bar as a result of which he fell down. It is alleged that others also assaulted him with sticks in their hands. Bharat became unconscious. Bharat was taken in a ST bus by some of the witnesses to the civil dispensary in Tuljapur. In the civil dispensary, after giving some treatment to Bharat the witnesses were asked by the doctor to take him to Solapur. Bharat was then taken in a matador to Civil Hospital, Solapur where they reached about 11-30 p.m. In the following morning PW

6 Sajjanrao Late, who was one of the eye witnesses to the incident and had taken Bharat along with others first to Tuljapur civil dispensary and thereafter to Civil Hospital, Solapur gave his written complaint to the Dy. Superintendent of Police Jadhav in which all the accused were named. That complaint is produced at Exhibit 41 which is dated 7th March 1987. The crime was registered initially, inter alia, for offence under Section 307 of IPC and the investigation commenced. A constable was deputed to the place of incident on the same day and the statements of some of the witnesses were recorded on 7th March 1987 and of others on 8th March 1987. Bharat, who had become unconscious at the place of incident, died in the hospital in the morning of 9th March 1987. Therefore the crime was registered for offence under Section 302 and for offences of unlawful assembly etc. After completion of the investigation charge-sheet was filed in the Court of JMFC, Barshi against 11 accused persons and the case

was committed to the Sessions Court at Solapur.

4. On 21st November 1987 the trial Court framed charges against all the 11 accused persons for offences under sections 147, 148, 302 read with section 149 in the alternative read with section 34 of IPC and for offences under section 341 read with section 149 of IPC and under section 323 read with section 149 in the alternative read with section 34 of IPC and for offences under sections 37(1) and 135 of the Bombay Police Act. All the accused pleaded not guilty to the charges framed against them.

5. On behalf of the prosecution 23 witnesses have been examined. There are about six eye witnesses to the incident being PW Nos.6, 7, 8, 13, 14 and 15. PW 6 is Sajjanrao Late who was an eye witness and has lodged the complaint. PW 7 Padmini is the wife of PW 8 Bhujang Sangale who had given lift to the deceased

Bharat on his motor cycle and was assaulted by accused no.2. PW 13 is Namdev Sonawane. PW 14 is Prabhakar Late who is uncle of deceased Bharat and PW 15 is Kamal Gajare, sister of PW 8. PW 1 Kulkarni had drawn the map of the place of offence. PW 2 Dr.Karande had examined Bharat in Civil Hospital, Solapur. PW 5 Dr.Prakash Patil had examined deceased Bharat in civil dispensary at Tuljapur. PW 12 Dr.Sardar had performed autopsy on the dead body and issued the death certificate. The other witnesses are panchas and police officers. The

case was investigated by PW 18 PSI Daulatrao Jadhav and PW 21 P.S.I. Kashinath Konnure. PW 17 is Vijay Jadhav, Dy. S.P. to whom written complaint was handed over by the complainant on the basis of which the crime was registered.

6. The defence of the accused was of total

denial and false implication. Accused no.1 has filed a written statement (Exh.3) in which he has mentioned that there were two parties in the village and that false complaint was lodged against the accused persons due to previous enmity. After considering the entire evidence on record the trial Court acquitted accused nos.3 to 11 of all the offences with which they were charged by the impugned judgment. The trial Court however, convicted accused nos.1 and 2 for the offence under Section 304 Part II read with Section 34 of IPC and sentenced them to RI for 7 years and to pay a fine of Rs.3000/- in default R.I. for 1 and 1/2 years. They were also convicted for offence under Section 341 read with section 34 of IPC and sentenced to RI for three months and to pay a fine of Rs.250/- in default R.I. for one month. The substantive sentences were directed to run concurrently.

7. Aggrieved by the said decision accused nos.1

and 2 filed Criminal Appeal No.255 of 1988 against the order of conviction and sentence recorded against them by the trial Court. The State on the other hand filed Criminal Appeal No.531 of 1988 against the order of acquittal of all the accused for offence under Section 302 of IPC as well as acquittal in respect of other offences. Thus the order of the trial Court is challenged by both, the State as well as the convicted accused. So far as accused nos.2 and 10 are concerned, they are reported dead and, therefore, Criminal Appeal Nos.255 and 531, both of 1988 abate as regards original accused no.2- Kisan Rama Jadhavar. Accused no.10- Mohan Laxman Jadhavar who is respondent No.10 in Criminal Appeal No.531 of 1988 filed by the State had also died and, therefore, appeal against him had already abated as recorded by the order of this Court dated 26/2/1991. Thus we are concerned with accused no.1 in Criminal Appeal No.255 of 1988 and accused nos.1, 3 to 9 and 11 in Criminal Appeal No.531 of 1988.

8. We have gone through the evidence of the prosecution witnesses with the assistance of the Advocate and have heard both sides at length. Mr.Mane appearing for all the accused persons contended that accused no.1 is entitled to be acquitted of the offences for which he was convicted and the order of acquittal in respect of all the accused deserves to be confirmed. On the other hand the learned APP seeks conviction of all the accused for all the offences with which they were charged including offence of murder under section 302 read with section 149 of IPC. Mr.Mane contended that there was delay in lodging FIR and in recording the statements of the eye witnesses. He argued that the FIR was lodged very late and was concocted. He also contended that false case has been lodged because of the previous enmity between the parties as mentioned in the written statement filed by accused no.1. He lastly contended that in any case there was no intention

to murder and, therefore, the accused cannot be convicted for offence of murder but for lesser offence. On the other hand Ms.Bhosale contended that by application of section 149 of IPC all the accused are guilty of offence of murder for the fatal assault made by accused no.1 on deceased Bharat. Alternatively she contended that in any way accused no.1 was liable to be convicted for offence of murder under section 302 of IPC.

9. The trial Court has acquitted accused nos.3 to 11 on the ground that the accused had no intention to kill deceased Bharat but they had assembled only to give beating to Bharat and since the common object of the assembly was not to kill Bharat the other accused cannot be convicted for the assault made on Bharat by accused no.1. Because of some discrepancies and omissions he has not believed the witnesses when they deposed that all the accused had assaulted the deceased. One of the reasons given by him to disbelieve assault by all

the eleven accused is that the deceased had not received so many injuries which can be said to be an act of eleven accused persons. The reason given for acquittal of accused nos.1 and 2 for the offence of murder is that accused no.1 cannot be said to have intended to kill Bharat but he can only be attributed the knowledge and, therefore, was liable to be convicted for offence of culpable homicide not amounting to murder. That is how the trial Court has convicted the accused nos.1 and 2 for offence punishable under section 304 Part II and not under section 302 of IPC.

10. Six persons have been examined on behalf of the prosecution as eye witnesses to the incident. PW 6 Sajjanrao Late has lodged complaint (Exh.41) on 7th March 1987 in which he has named all the 11 accused persons. He was also eye witness to the incident. He has deposed about the relationship between some of the accused inter se and stated that accused no.11

Vishwas Chavan was the Sarpanch of Mirzanpur. Accused nos.1 and 4 are brothers, accused nos.9 and 10 are brothers and accused no.2 was the cousin of accused nos.9 and 10. Accused no.8 is the uncle of accused no.3. Accused no.4 was Police Patil of Mirzanpur at the relevant time. Accused no.1 was running a fair price shop in Mirzanpur since previous five to six years. There were complaints filed by the villagers against him as they were not getting proper supply of grains from his shop. Because of the complaints given to the superior officer his licence was suspended and thereafter he obtained stay of the suspension order. The incident had taken place on 6th March 1987 when PW 6 complainant was sitting near Maruti temple along with other witnesses and chitchatting there. He saw the accused beating Bharat Late near the tomb. Accused no.1 was beating Bharat with an iron bar in his hand and accused no.2 with a hunter. He has also named other accused who were

beating Bharat with either stick or iron bar and some were pelting stones. He heard accused no.1 saying that Bharat was filing cases against him regarding his ration shop and, therefore, he should be beaten. Bharat fell down because of the assault on him. At that time moped motor cycle of Bhujang Sangale was lying there. Complainant requested the accused not to beat Bharat. He thereafter, along with other persons, took injured Bharat to Tuljapur civil dispensary and thereafter on the advice of doctor took Bharat to Civil Hospital, Solapur. Next day morning he gave written complaint to Dy.S.P. Jadhav. There is corroboration to his deposition from his complaint (Exh.41).

11. Complainant's evidence is also supported by PW 7 Padmini who is wife of PW 8 Bhujang Sangale who had given lift to Bharat on his motor cycle. She had stated that as she saw motor cycle of her husband there she thought that her husband had fallen down and, therefore,

she tried to protect him by falling on his body.

According to her she also received stick blows from the accused persons as a result of which her bangles were broken and pieces thereof fell at the place of incident.

Then there is evidence of PW 8 Bhujang Sangale who deposed about the villagers having complained to the District Supply Officer against accused no.1 which was signed by him also and, therefore, his licence was suspended. Thereafter he obtained stay on the suspension order and again began to conduct his fair price shop. He deposed that his sister Kamal PW 15 came near the school running from her house and told him that there was danger ahead and, therefore, he stopped his motor cycle but in the mean time accused reached there and started assaulting him. He was assaulted with hunter by accused no.2 and thereafter he ran towards Tuljapur side and did not return that night out of fear.

He saw some of the accused were chasing him while others

were seen by him assaulting deceased Bharat. He has deposed that accused nos.9, 10 and 11 were chasing him while other accused started assaulting Bharat.

12. Then there is evidence of PW 13 Namdev Sonawane who also deposed about complaint lodged against accused no.1 by the villagers. He saw PW 8 Bhujang Sangale and deceased Bharat coming on moped and when they reached near the tomb PW 15 Kamal, sister of Bhujang, came there and thereafter accused persons stopped Bhujang and then they started assaulting Bharat. He also deposed about some of the accused persons chasing Bhujang and that accused no.2 assaulted Bhujang with hunter. He deposed about accused no.1 having iron bar in his hand and instigating others by asking them to catch Bharat and giving two blows with iron bar on Bharat's head and Bharat urging him not to beat him. He had also accompanied complainant Sajjanrao to take Bharat to Tuljapur and thereafter others took him from

Tuljapur to Civil Hospital at Solapur. There is also evidence of Prabhakar Late, uncle of Bharat. He seems to have gone to the place of incident after hearing the noise. When he reached there Bharat was lying down in injured condition. He is one of the persons who had taken injured Bharat to Tuljapur. He is the uncle of Bharat. Last eye witness is PW 15 Kamal Gajare who is sister of PW 8 Bhujang. She was told by Bhujang's son Pintu that about 11 persons had gathered near the school building and Kisan and Rama had enquired from him when his father would be returning and that accused no.2 was saying that they would beat Bhujang on that day. Hearing that witness ran towards the school building along with Pintu. When her brother Bhujang came on motor cycle from Tuljapur, she told him not to go ahead as people had gathered to beat him. However, in the mean time accused reached there and started chasing Bhujang and beating Bharat. She has deposed that accused no.1 dealt blow with iron bar on the head

of

Bharat. She has further deposed that accused no.1 was

asking others to beat Bharat and not to leave him and

that Bharat was complaining against his ration shop and,

therefore, he should not go back alive.

13. Thus there are eye witnesses to the incident.

At least four of the six aforesaid witnesses have

clearly witnessed the incident of assault from its

inception and they have deposed about accused no.1

assaulting deceased Bharat on head with iron bar.

Accused no.1 was heard saying that Bharat had complained

against his running ration shop and, therefore, he

should not be left alive. The witnesses have also spoken

about the motive. PW 14 Prabhakar Late, uncle of

Bhujang has deposed that Bharat had taken lead in

complaining against the shop of accused no.1. May be

the other accused persons may have come to the aid of

accused no.1 at that time because of the previous

political rivalry but it was mainly accused no.1

who wanted to assault Bhujang and Bharat because of the complaints lodged against his ration shop as a result of which his licence was suspended. At the time of incident he had said that Bharat was complaining against him and, therefore, not to leave him. It was he who had dealt blows with iron rod on the head of Bharat. Thus the motive of accused no.1 in assaulting deceased Bharat and the evidence of the eye witnesses that it was accused no.1 who assaulted Bharat with iron rod on his head does not leave any manner of doubt about the role played by accused no.1.

14. The medical evidence led by the prosecution shows that it was the assault on the head of the deceased that was the cause of death of Bharat. To begin with PW 5 Dr.Patil who had examined Bharat in Civil Dispensary at Tuljapur at 8 p.m. on 6th March 1987 has deposed that following seven injuries were noticed on the person of Bharat:

(1) C.L.W. right temporal parietal region 2" x 1".

(2) Abradded contusion 2" x on right forearm 2" x 1".

(3) Abradded contusion left lumber region (horizontal) 6" x 1".

(4) Contusion right scapula medial size (horizontal) 4" x 1".

(5) Abrasion verticle right lumbar region 6" x 1/4".

(6) Abrasion right thigh ant. 1" x 1".

(7) Abrasion left thigh anteribal middle 1/2" x 1/4".

Those injuries were caused by hard and blunt object within six hours and could be caused with stick, iron bar etc. He had referred the patient to Civil Hospital, Solapur.

15. In Civil Hospital, Solapur Bharat was examined by Dr.Karande PW 2. He had examined the patient at about 11-40 p.m. on the date of incident. According to him the patient was in semi conscious

condition when he was brought to the hospital and he was serious. He found eight injuries on his person. According to him out of the eight injuries mentioned by him injury nos.5 and 6 could be caused by hard and blunt object. He has deposed that there were blood clots in the brain and the clotting of blood was due to injury nos.5 and 6 which were sufficient in the ordinary course of nature to cause the death as there was internal bleeding and clotting of blood. There was also fracture of left ulna. Injury nos.5 and 6 as per his report are as follows:

(5)CLW over right parietal region 2 1/2" x 2"
scalp deep bleeding present.
(6) Haematoma over occipital region 1/2" in
diameter.

This doctor has deposed that haematoma could not be due to any other reason except the injury nos.5 and 6. He has further deposed that injury nos.5 and 6 could be caused by iron bar or stick like article nos.16 and 17

shown to him. Thus the evidence of eye witnesses has been sufficiently corroborated by the medical evidence. None of the witnesses have attributed assault on Bharat on his head except by accused no.1 with iron bar. The injuries received by Bharat on his head were the cause of his death. The prosecution has proved the motive. As per the deposition of P.W.14 it was Bharat who had taken leading part in complaining against accused no.1 as regards his irregularities or for not supplying proper food grains through his ration shop. The words uttered by accused no.1 at the time of assaulting him go clearly to show that he had animus or motive against Bharat because of the complaints lodged by him against accused no.1 and, therefore, he did not want to leave Bharat alive at that place.

16. There is also evidence of another doctor PW 12 Dr.Sardar who performed autopsy on the dead body. He had mentioned following six injuries noticed by him on

the dead body. According to him cause of death was due to shock and hemorrhage due to extradural and subdural haemotoma compressing the brain.

(1) Burrhole sutured wound on both tempro parital region, Right Burrhole sutured wound 5 inch, left burrhole 3 inch sutured wound.
(2) Contusion occipital region 1/2 inch.
(3) Abrasion on right thigh 1" black coloured.
(4) Abrasion on right illoc fossa 2 inch.
(5) Abrasion on right scapula region 1" x 1/2".
(6) Fracture of left ulna middle 1/3.

Thus according to this doctor Bharat had wounds on temporal as well as occipital region and there was contusion on occipital region 1/2 inch. There was also fracture of left ulna middle 1/3. He also found following injuries on internal examination:

(1) Hamatoma under scalp on both temporo parital and occipital region
Brain:- Extra dural and sub dural haematoma on both tempo parital and occipital region.

According to him internal injuries were corresponding to

external injury nos.1 and 2. In his opinion injury nos.1 and 2 along with internal injuries were sufficient in the ordinary course of nature to cause the death of Bharat.

17. Thus the injury caused by accused no.1 was sufficient in the ordinary course of nature to cause death of Bharat. There is evidence of eye witnesses not one but at least four eye witnesses to the assault on the deceased and the other two witnesses having seen accused no.1 at the place of incident who had reached at the spot immediately after Bharat had fallen down due to the head injury caused to him. The evidence of eye witnesses is corroborated by the medical evidence as well as FIR lodged by PW 6 and there is evidence of motive led by the prosecution. The argument that because of the previous enmity and the political rivalry the witnesses had filed false complaint against all the accused is difficult to believe. On the contrary the

complaints against the Ration shop of accused no.1 which seem to have mainly motivated him to assault Bharat constitutes motive for the aforesaid offence. The criticism made by the defence Advocate about the late filing of FIR and that the real FIR must have been replaced by Exhibit 41 is absolutely without any substance and foundation. The argument that on the date of the incident the police constable had gone to the place of incident yet no complaint was lodged with him is also devoid of any substance. When the main male eye witnesses had taken the injured person to the hospital in the same night initially in ST bus traveling 13 Kms. to Tuljapur and from there in a matador to Solapur hospital, the complaint could not have been lodged earlier than the following morning. The witnesses who were relations of injured Bharat were concerned for taking him to the hospital for securing him medical aid first. They were not expected to rush to the police station for lodging complaint first when the injured

was in serious condition. That was the next thing to be done in such cases where the injured had become unconscious and would have breathed his last any moment. In those circumstances when the main witnesses were with the injured in the hospital no person in the village was expected to go forward and lodge complaint with the constable who was deputed to the village for general enquiry.

18. PW 6 has lodged his written complaint giving details to the Dy.S.P. who thereafter instructed his subordinates to take action in the matter. Dy.S.P. was not the person who normally takes down the complaint or prepares the proforma FIR and registers it. Therefore, the written complaint given to Dy.S.P. was forwarded to his subordinates for taking action in the matter and when that complaint was lodged on the following morning and the incident had taken place in the previous night, it cannot be said that there was delay in lodging

the FIR. Similarly the argument that the prosecution has not brought on record the complaints made by Bharat or PW 8 in respect of the Ration shop of accused no.1 is without any substance in view of the evidence led by the prosecution witnesses attributing words to accused no.1 at the time of incident that Bharat had lodged complaint against his ration shop. There is no denial that no such complaint was lodged. The argument then advanced is that the signatures of PW 8 and Bharat are not proved to have been made on such complaints. That cannot falsify the prosecution case when it is not disputed in the written statement (Exh.3) that their names were mentioned in the complaint made to Rationing authority.

19. The defence Advocate also contended that no one informed the police at Tuljapur about the incident though the police van was there near the Government dispensary. When the patient was serious and unconscious the relatives who had taken the patient

to

the hospital were concerned with securing him medical

aid first and save his life than to go and lodge

complaint with the police first. From Tuljapur they had

to take the patient to Solapur civil hospital as per the

advice of the doctor at the medical dispensary as

deposed to by PW 5. Similarly PW 22 Head Constable

Shinde attached to Vairag police station who had gone to

Mirzanpur village on 7th March 1987 after making entry

in the station diary has deposed that when he made

enquiry about the relatives of the injured person he

learnt that all the relatives of the injured had gone to

Solapur. Thereafter he gave report to the police

station at about 4 p.m. on that day which is Exhibit 70.

When the main relatives had accompanied the patient to

Solapur the lady members remaining in the village were

not expected to lodge their complaint nor the head

constable was deputed there for that purpose.

20. Much has been commented about the

deposition of the witnesses when they stated that PW 7 Padmini had fallen on the body of Bharat to protect him which was an omission in the police statements of the witnesses. May be at the time of recording statements none of the witnesses might have felt that aspect to be so important which needed to be stated before the police. That would not however falsify the presence of Padmini at the place of incident. According to her own deposition she had gone there when Bharat had fallen down and thinking that it must be her husband because his motor bike was parked there, she fell on his body to shield him from further assault. Even Bharat was her relation. But the fact remains that she has deposed without any omission that because of her falling on the body of the injured her bangles were broken which were attached under the spot panchanama from the place of incident and broken pieces of the bangles tallied with her remaining bangles.

21. The evidence of the prosecution as

discussed above leaves no manner of doubt about the accused no.1 having assaulted deceased Bharat on his head with an iron bar. There was recovery of iron bar at his instance which was found to be stained with human blood as per CA report (Exh.79). Though the recovery was not supported by panch PW 10, it is proved by the Investigating Officer PW 21 PSI Konnure whose evidence cannot be said to be unreliable for any reason. The question, therefore, is whether the prosecution has proved the charges framed against the other accused persons.

22. Apart from the specific assault attributed to accused nos.1 and 2 by the prosecution witnesses the witnesses have generally deposed about the presence of the other accused persons and they having insulted the deceased and assaulted him. Some of the accused had chased PW 8 Bhujang who escaped by running away to Tuljapur. According to P.W. 8 accused no.2

had initially assaulted him on his back with his hunter but no injury was found on his person to support that evidence. No witness has specifically named any other accused for having assaulted deceased Bharat. In our view the trial Court had rightly observed that all the accused had not formed common object to commit the murder of Bharat. They were waiting for the arrival of PW 8 Bhujang Sangale. The main assault on the head of Bharat was attributed specifically by the witnesses to accused no.1 who had also uttered the words that he should not be left alive as he had complained against his ration shop. The trial Court has given benefit of doubt to other accused persons and acquitted them. No doubt they were present there but there is no evidence of the common object which could be said to have been shared by accused nos.3 to 11 and in the absence of specific assault attributed to any of them it would not be possible to interfere with the view taken

by the trial Court in this appeal against acquittal.

The view taken by the trial Court in respect of the rest of the accused cannot be said to be a perverse view which would warrant interference in the appeal against acquittal. That cannot be possible when the common object or common intention is not proved to have been shared by the other accused. The trial Court had attributed common intention only to accused no.2 and, therefore, he was convicted by virtue of section 34 of IPC along with accused no.1. But the appeal against him having abated we are not required to consider his role in the incident.

23. The last question which requires consideration is whether accused no.1 has committed the offence of murder punishable under section 302 of IPC or culpable homicide punishable under section 304 of IPC. The learned Addl. Sessions Judge dealing with the said point, after considering the medical evidence, has

observed in para 55 of the judgment as follows:

> "... The blows with the iron bar produced in Court were dealt on the head of Bharat and even if it is accepted that the intention to commit murder is not positively proved, the accused who, in fact, assaulted Bharat cannot claim that they had no knowledge that the injury inflicted on the head was likely to cause death. They were acting in furtherance of common intention of beating and causing injuries to Bharat which intention did exist since the time they had gathered there or since the time they saw Bharat and Bhujang coming on moped and, therefore, the offence involved would fall under Part II of section 304 read with section 34 of the Indian Penal Code and not under Section 302 of the Indian Penal Code."

In our view the trial Judge had clearly committed an error in holding that the offence would fall under Part II of Section 304 and not under section 302 of IPC. The view taken by the trial Court does not appear to be in consonance with the provisions of Sections 299 to 304 of the Penal Code. It would be, therefore, desirable to consider the provisions of the Code relating to culpable

homicide in some detail to remove the cobweb which surrounds the subject due to the misunderstanding and misapprehension of the scheme of the Code as regards the offence of murder and culpable homicide.

24. The applicability of the provisions of section 304 does not depend on whether the act causing death is done with the knowledge that it is likely to cause death or the person committing the act knows that such bodily injury is likely to cause death. If such view is taken one cannot explain why the first part of section 304 refers to the act done with the intention of causing death or with intention of causing such bodily injury as is likely to cause death. The determining factor for applicability of section 302 or section 304 of IPC is whether culpable homicide amounts to murder or does not amount to murder. Whether culpable homicide is murder or not is defined in section 300 of IPC itself. The main four clauses of section 300 define when

culpable homicide is murder. If the act of the offender falls in any one of the four clauses of section 300 the act of the offender is murder and, therefore, punishable under section 302 of IPC. The act ceases to be punishable under section 302 only when the act, though falling under any one of the four main clauses of section 300, also attracts, or falls under, any one of the five exceptions enumerated in section 300 of IPC. In both cases such act is culpable homicide in the sense that it is homicide which is punishable and not exempted from punishment under any of the general exceptions provided under Chapter IV of IPC. The phrase culpable homicide is, therefore, used to distinguish it from homicidal deaths which are not culpable i.e. not punishable by virtue of being exempted under the General Exceptions enumerated under Chapter IV of the Code. For example the death caused due to pure accident is not punishable. Similarly homicidal death committed by a child under 7 years of age is totally exempted

from

punishment and, therefore, it is not a culpable

homicide. If murder is committed by child above 7 years

of age but under 12 years, who has not attained

sufficient maturity of understanding to judge the nature

and consequences of his conduct on that occasion, is

also exempted from punishment under section 83 in

certain circumstances. The code also exempts from

punishment under Section 84 the murder committed by a

person who by reason of unsoundness of mind is incapable

of knowing the nature of the act committed by him.

25. It would, therefore, be equally wrong to say

that if the offence falls under section 299 of the Code,

which defines culpable homicide in general, it would be

punishable under section 304 of the Code. Section 299

of the Code defines in general culpable homicide in

contra-distinction to the homicidal death which is not

punishable under the Code by virtue of falling under any

of the General Exceptions enumerated in Chapter

IV

thereof. This is also clear from the following opening

words of section 299 which defines culpable homicide to

mean and include, "Whoever causes death by doing an act

with the intention of causing death, or with the

intention of causing such bodily injury as is likely to

cause death". (Emphasis supplied) It is only section

300 of the Code which makes a distinction, not between

culpable homicide and murder as such, but between

culpable homicide which amounts to murder and which does

not amount to murder for the purpose of punishment only.

It is significant to note that both sections, Section

299 as well as Section 300, refer to intention as well

as knowledge. Similarly Section 304 also refers to the

commission of murder intentionally as well as with the

knowledge of the consequences of the act.

26. Under section 300 of the Code homicidal act,

which is not otherwise exempted under the General

Exceptions, is punishable as offence of murder

under

section 302 of IPC if the act falls under any one of the

four main clauses of section 300. The homicidal act

which is culpable in the sense that it is punishable

because it is not exempted under any of the General

Exceptions is not punishable for offence of murder under

section 302, though the act falls under any one of the

main clauses of section 300, if the act also attracts or

falls under any one of the five exceptions mentioned in

the said section. For instance homicidal act falling

under the first clause of section 300 i.e. when death is

caused with the intention of causing death amounts to

murder punishable under section 302. It will, however,

be punishable under section 304 if there was grave and

sudden provocation because of which the offender was

deprived of the power of self control as provided under

Exception 1 of Section 300 or if the offender in

exercise of the right of private defence of person or

property exceeds that right as provided under Exception

2 of the said section, though the act was intentional. When the death is caused intentionally, because of the applicability of an exception it would be punishable under Clause I of section 304 of the Code. Clause II of section 304 would be applicable only if the homicidal act is committed with the knowledge that it is likely to cause death but without any intention to cause death provided the act falls within one of the five exceptions mentioned in section 300 of the Code.

27. In other words the turning point for bringing the case under section 304 of IPC is not when the act is done with the knowledge that it is likely to cause death as provided in the last clause of Section 299 or falling under clause fourthly of Section 300 of the Code but it is the applicability of any of the five exceptions enumerated in section 300 of IPC which would bring the case under Section 304 of the Code. From the aforesaid discussion it is crystal clear that the phrase culpable

homicide is not used for bringing the case under section 304 of IPC but the said phrase can be commonly used whether the homicidal death is punishable under section 302 or under section 304 of IPC. The distinction made by the Code is not between the culpable homicide and murder as such as wrongly assumed or understood. The Code has made distinction between culpable homicide amounting to murder and culpable homicide not amounting to murder only for the purpose of punishment. The wording used by section 300, when "culpable homicide is murder" and "when culpable homicide is not murder", also amply supports aforesaid view.

28. In this respect the use of the phrase "culpable homicide" in section 301 of IPC would also throw light on this subject which reads as follows:

> 301. Culpable homicide by causing death of person other than person whose death was intended -- If a person, by doing anything

to by death be homicide the he whose be

which he intends or knows to be likely cause death, commits culpable homicide causing the death of any person, whose he neither intends nor knows himself to likely to cause, the culpable committed by the offender is of description of which it would have been if had caused the death of the person death he intended or knew himself to likely to cause. (Underlining supplied)

Section 301 incorporates the doctrine of "transferred malice" or "transmigration of motive". Though the heading as well as the body of section 301 uses the phrase "culpable homicide" the offence will not be necessarily punishable under Section 304 of IPC but in a given case i.e. in the absence of applicability of any of the exceptions laid down in section 300, the offence will be punishable under section 302 of IPC. To remove any doubt about the same, reference may be made to one of the various judgments of the Supreme Court on the point. For instance in the case of Jagpal Singh v.

State of Punjab reported in AIR 1991 SC 982 where the appellant-accused had shot at Surjit Kaur even though he had aimed at Kapur Singh it was held that under the doctrine of transfer of malice as contemplated under Section 301 of IPC the accused had committed offence punishable under Section 302 of IPC. This would show that notwithstanding the use of the phrase "culpable homicide" in Section 301 the accused was convicted for offence under Section 302 and not under Section 304 of IPC. It goes without saying that in the above case if any of the exceptions referred to in Section 300 were applicable the case would be punishable under Part I or Part II of Section 304 of IPC depending on whether the murder was committed with the requisite intention or knowledge. This is obvious from the latter portion of the section, "the culpable homicide ..... is of the description of which it would have been if he had caused the death of the person whose death he intended or knew

himself to be likely to cause." (Emphasis supplied).

Thus the applicability of section 302 or section 304 of IPC does not depend on the use of the term `murder' or the phrase "culpable homicide" nor does it depend on whether the offence of murder was committed with requisite intention or knowledge but in either case depends on whether any of the exceptions enumerated in section 300 of IPC is attracted.

29. It would not be out of place to refer to the judgment of the Division Bench of this Court delivered by one of us (Parkar,J.) in the case of Shankar Mahia Andher Vs. Union of India reported in 1998 ALL MR (Cri) 1387 taking similar view. That was a case where a single blow was dealt with a wooden log on the head of the deceased. Rejecting the argument that it would be an offence punishable under Section 304 of IPC it was observed in paragraph 17 of the judgment as follows:

> "...It is manifest from these two provisions of the Indian Penal Code i.e. section 299

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300 that section 299 defines only in what is culpable homicide. Culpable is divided into two types under section of the Code for the purpose of If the case falls under any one of the four clauses of section 300 of the Penal Code, which are virtually repetition of the three clauses of 299 of the Code, it becomes punishable section 302 of the Indian Penal However, if the case is covered by any of exceptions under section 300, the will be punishable under section 304 of said Code. It is only after the offence held to fall under any one or more of five exceptions to section 300 that the has to find out whether culpable homicide amounting to murder was committed with intention as referred to in the first part section 304 or with the knowledge that it likely to cause death in which case it be punishable under Part II of section 304 the Indian Penal Code. In other unless the offence of murder falls under of the exceptions embodied in section 300, cannot be made punishable under section of IPC. The requisite intention or

is not the factor which determines whether the offence is punishable under Section 302 or under section 304 of the Code. The determining or the differentiating factor is the applicability or otherwise of any of the exceptions provided under section 300 of the Penal Code. If this distinction is borne in mind, we have no manner of doubt that in the light of the aforesaid scheme of the Penal Code, the offence in question cannot be said to be punishable under section 304 Part II or even under Part I of section 304 of the Indian Penal Code as being covered under clause 3 of section 299 as submitted by Mr.Manudhane. According to him, the appellant could only be said to have the knowledge that by his act he was likely to cause death and, hence, it was an offence under section 299 punishable under section 304. In our view, the contention raised by the defence counsel is the result of misreading of the aforesaid provisions of the Penal Code, as there is no question of application of section 304 ipso facto to any of the clauses of section 299 of the Code."

30. The sum and substance of the foregoing discussion is that the Code does not make

distinction between culpable homicide and murder as such as is generally assumed or understood but it only provides for different punishment depending upon whether the rigour of offence of murder is mitigated by attracting any of the exceptions mentioned in Section 300. If none of the exceptions are applicable culpable homicide is called murder punishable under Section 302 but if any of the exceptions are applicable it is not murder punishable under Section 302 but the offence is punishable under Section 304 of IPC. Section 299 of IPC only in general defines culpable homicide or murder which is punishable under the Code as distinct from the homicidal death which is exempted from punishment under the General Exceptions provided in Chapter IV of the Penal Code.

Whether culpable homicide or murder will be punishable under Section 304 of IPC or under Section 302 of IPC depends on whether any of the exceptions enumerated in section 300 are applicable or not. Even if the murder

is committed with the requisite knowledge as laid down in clause fourthly of section 300, offence will be punishable under section 302 of IPC. The said offence will fall under Part II of section 304 only in case any one of the five exceptions enumerated in section 300 of IPC is attracted. Same principle will apply in case the culpable homicide is covered by the last clause of section 299 of IPC i.e. when the death is caused by doing an act with the knowledge that the act was likely to cause death. Conversely if the culpable homicide is committed or death is caused with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death as provided in section 299 of IPC or if the case falls under any one of the first three clauses of section 300, the offence will be punishable under section 302 of IPC unless any one of the five exceptions enumerated in section 300 is attracted in which case the offence would be punishable

under Part I of section 304 of IPC.

31. If the provisions of the Code are understood as aforesaid there can be no doubt that in the present case even if it is assumed that the accused no.1 had no intention of causing death of Bharat, and his act in assaulting Bharat was done with the knowledge that it was likely to cause death or his act was done to cause such bodily injury as is likely to cause death, it would fall under clause fourthly of section 300 and since none of the exceptions enumerated in section 300 is attracted the culpable homicide committed by accused no.1 is murder punishable under section 302 of IPC which provides punishment for culpable homicide amounting to murder and not under section 304 which provides punishment for culpable homicide not amounting to murder. In the absence of the act of accused no.1 falling under any of the exceptions enumerated under section 300 of IPC, the trial Court had clearly erred in law in awarding punishment under Part II of section

304

of IPC. Neither the defence has endeavoured to bring the homicidal act of accused no.1 under any of the exceptions enumerated under section 300 of IPC nor the trial Court has attempted to do so, nor can we contemplate any exception under which the act of accused no.1 can be said to fall. The obvious result is that the conviction of accused no.1 will have to be altered to offence punishable under section 302 of IPC.

32. In this case, as referred to earlier, from the words uttered by accused no.1 that Bharat should not be left alive and the fact that the assault was made with iron bar on the vital part of the body like head with such force which caused haematoma under scalp on temporal, parietal as well as on occipital region 1/2" and fracture of left ulna resulting in haemorrhage due to compression of the brain, the obvious intention was to commit murder contemplated under the first clause of section 300. In any event the accused no.1 had

caused death of Bharat by an act done with the intention of causing such bodily injury which he knew to be likely to cause death of Bharat falling under clause secondly of section 300. When the act was done by accused no.1 with the intention of causing such bodily injury to Bharat which was sufficient in the ordinary course of nature to cause death it would fall under clause thirdly of section 300. In the absence of applicability of any of the exceptions enumerated under section 300 the accused no.1 could only be punished under section 302 of IPC and not under section 304 of IPC.

33. In this connection reference may be made to the couple of recent decisions of the Supreme Court cited on behalf of the State. In the case of Suraj Bhan v. State of Haryana reported in 2003 ALL.MR (Cri) 573 (S.C.) where the accused had dealt a lathi blow on the left parietal side of head of the deceased consequent to which the deceased died it was held that intention

to kill was present and conviction under section 302 was justified. In that case there was solitary fatal blow given on the head of the deceased and the Doctor had opined that injury was caused in such a manner as to cause death of the deceased causing fracture of left parietal bone causing extra dural haemotoma. It was held that the appellant must be attributed the knowledge that when he used a lathi forcefully on the head of the person, he was likely to cause death of the said person and the prosecution had also proved that the accused had intention to kill the deceased.

34. In the case of Hari Singh v. State of Rajasthan reported in AIR 1997 SC 1505 where the accused had given lathi blow on the head of the deceased resulting in fracture of skull of the deceased and the internal injuries received in his brain were by themselves sufficient in the ordinary course of nature to cause death, it was held that the accused was

rightly convicted for offence punishable under section 302 of IPC. The ratio of the aforesaid two judgments of the Supreme Court is squarely applicable to the instant case. We, therefore, have no hesitation in holding that the accused no.1 is liable to be convicted for offence under section 302 of IPC and not under section 304 of IPC as wrongly held by the trial Court.

35. In the result, Criminal Appeal No.255 of 1988 abates so far as appellant no.2-original accused no.2 is concerned as he is reported to be dead. So far as accused no.1-Pralhad Krishnat Patil is concerned, his order of conviction and sentence recorded by the Addl. Sessions Judge, Solapur in Sessions Case No.108 of 1987 under Section 341 read with section 34 of IPC is confirmed. As regards the order of conviction and sentence of accused no.1 under section 304 Part II read with section 34 of IPC is concerned, the same is altered by virtue of the State Appeal being Criminal

Appeal No.531 of 1988, and he is convicted for offence under section 302 of IPC and sentenced to RI for life and to pay a fine of Rs.3000/- in default to suffer further R.I. for one year. The substantive sentences shall run concurrently. Accused no.1-Pralhad Krishnat Patil is directed to surrender to his bail bond within four weeks from today. The order of acquittal of the rest of the respondents-accused for various offences is confirmed. Their bail bonds shall stand cancelled. Criminal Appeal no.531 of 1988 is thus partly allowed and Criminal Appeal No.255 of 1988 is disposed of accordingly.

(S.S.PARKAR,J.)

(SMT. RANJANA DESAI,J.)